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4 ROBIN HUMPHREY,
5 Plaintiff,
6 v.
7 THE J.M. SMUCKER COMPANY,
8 Defendant.

9 Case No. [22-cv-06913-WHO](#)
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13 **ORDER GRANTING IN PART AND
14 DENYING IN PART MOTION TO
15 DISMISS**
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17 Re: Dkt. No. 28
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20 Defendant The J.M. Smucker Co. (“Smucker”) moves to dismiss a class action complaint
21 brought by plaintiff Robin Humphrey, who alleges that Smucker falsely represented that certain
22 dog and cat food products were healthy for pets when in fact they contain titanium dioxide
23 (“TiO₂”) and their packaging contains (or risks containing) per-and polyfluoroalkyl substances
24 (“PFAS”), both of which can cause detrimental health effects. Smucker’s motion is GRANTED
25 in part and DENIED in part.¹ Humphrey has alleged an injury to show individual standing in this
26 false advertising case but does not have standing to assert claims on behalf of other class members
27 who purchased the products in other states. The claims asserted on behalf of the multi-state
28 subclass are DISMISSED with leave to amend. Otherwise, Humphrey’s claims may proceed. The
alleged statements at issue are actionable at this point, and Smucker’s challenge to her negligent
misrepresentation claim is not persuasive.

29
30 **BACKGROUND**

31 Three brands of pet food are pertinent to this case: 9Lives, Kibbles ‘n Bits, and Meow Mix
32 (collectively, “the products”). First Am. Compl. (“FAC”) [Dkt. No. 27] ¶ 1. Humphrey, a
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35 ¹ Pursuant to Civil Local Rule 7-1(b), this motion is suitable for disposition without oral argument
36 and the May 24, 2023, hearing is VACATED.
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1 California resident, alleges that she purchased these products because of her interest in “providing
2 her pets with healthful food that would not expose her pets to harmful chemicals or other
3 substances.” *See id.* ¶¶ 17-18. Her most recent purchase occurred at her local Walmart in July
4 2022. *Id.* ¶ 18.

5 Before purchasing the products, Humphrey allegedly reviewed and relied on
6 representations on their labeling, packaging, and marketing materials, which stated that the
7 products were healthy for animals. *See id.* ¶¶ 18-19. The FAC alleges that the following
8 statements were made on the 9Lives cat food packaging:

- 9 • “Caring for cats since 1959”
- 10 • “100% Complete & Balanced for Adult Maintenance”
- 11 • “100% Complete and Balanced Nutrition for Adult Cats”
- 12 • “Helps Support a Healthy Immune System”
- 13 • “Helps Support Healthy Weight & Metabolism”
- 14 • “Helps Maintain Weight & Digestion”
- 15 • “Blend of Essential Vitamins and Minerals”
- 16 • “High Quality Ingredients & Natural Fiber”

17 *Id.* ¶ 45. Smucker “further represents that the pet food will build ‘strong muscles,’ enable ‘healthy
18 heart and vision,’ and produce ‘healthy skin & coat.’” *Id.* The FAC alleges that Humphrey saw
19 these representations, understood them to mean that the products “were healthful for her cat,” and
20 would not have purchased them “absent her desire to provide healthful nutrition for her cat.” *Id.*

21 The FAC identifies two statements made on the Kibbles ‘n Bits dog food packaging:
22 “100% Complete and Balanced Nutrition for Adult Dogs” and “balanced nourishment in every
23 bite!” *Id.* ¶ 46. Humphrey allegedly saw these representations, understood them to mean that the
24 products “were healthful for her dog,” and would not have purchased them otherwise. *See id.*

25 Humphrey allegedly saw the following statements on the Meow Mix cat food packaging:
26 • “100% Complete & Balanced Nutrition For Adult Cats”
27 • “indoor health”
28 • “all essential vitamins & minerals”

- 1 • “antioxidants [that] help support a long, healthy life”
- 2 • “helps maintain healthy weight”

3 *Id.* ¶ 47. Again, the FAC alleges that Humphrey understood these representations to mean that the
4 food was “healthful for her cat,” and would not have purchased the products otherwise. *See id.*

5 Despite these representations, the FAC alleges that the products contain TiO₂, an
6 “inorganic compound” that is “relied upon heavily as a pigment in a variety of applications
7 including paint, sunscreen, and food coloring.” *See id.* ¶¶ 25, 49. According to the FAC,
8 “research has shown that TiO₂ can pass through biological membranes, circulate through the
9 body, and enter cells,” resulting in “detrimental health effects including DNA and chromosomal
10 damage, organ damage, inflammation, brain damage, genital malformations, lesions in the liver
11 and kidneys, and cell neurosis.” *Id.* ¶ 28. It further alleges that “[t]hese health concerns . . . are
12 not limited to human foods,” noting that Petco (“North America’s second-largest pet supplies
13 chain”) removed pet food and treats containing TiO₂ by May 2019. *Id.* ¶ 30.

14 In addition, the FAC alleges that the products’ packaging “contain (or risk containing)”
15 PFAS, “synthetical chemicals that pose undue health risks.” *Id.* ¶ 1. According to the FAC,
16 researchers have established that PFAS “are incredibly mobile” and “readily migrate into food,”
17 posing risks of serious health effects including kidney and liver damage, cancer, and increased
18 cholesterol levels. *Id.* ¶¶ 40-42.

19 Because the products allegedly contain TiO₂ and their packaging contains (or risks
20 containing) PFAS, Humphrey contends that the products “are not healthful” as represented and
21 instead “pose a significant health risk” to pets. *See id.* ¶ 15. The FAC alleges that Smucker does
22 not inform consumers that the products contain or risk containing PFAS and only references TiO₂
23 on the products’ ingredient list—“in tightly woven, minuscule block print on the back of the
24 products, which consumers are unlikely to notice.” *Id.* ¶ 13.

25 Humphrey sued Smucker in November 2022, and filed the FAC nearly five months later.
26 Dkt. Nos. 1, 27. The FAC alleges 10 claims: violations of California’s Unfair Competition Law
27 (“UCL”), Consumers Legal Remedies Act (“CLRA”) and False Advertising Law (“FAL”) and of
28 the consumer fraud acts of the states named in the proposed subclass; along with fraud, fraudulent

1 inducement, fraudulent concealment or omission, fraudulent misrepresentation, negligent
2 misrepresentation, and unjust enrichment. Dkt. No. 27. Humphrey asserts these claims on behalf
3 of a two classes, the first of which (“the Class”) is defined as:

4 [A]ll persons in the State of California who, within the applicable statute of
5 limitations period, up to and including the date of final judgment in this action,
6 purchased any of defendant’s products at issue.

7 *Id.* ¶ 62. The second is a “Consumer Fraud Multi-State Subclass,” defined as:

8 [A]ll Class Members who within the applicable statutes of limitations period, up to
9 and including the date of final judgment in this action, purchased any of the
products at issue in California, Florida, Illinois, Massachusetts, Michigan,
Minnesota, Missouri, New Jersey, New York, or Washington).

10 *Id.*

11 Three weeks after Humphrey filed the FAC, Smucker moved to dismiss. Dkt. No. 28.

12 **LEGAL STANDARD**

13 **I. RULE 12(B)(1)**

14 A motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court’s subject
15 matter jurisdiction. *See Fed. R. Civ. P. 12(b)(1)*. “Federal courts are courts of limited
16 jurisdiction,” and it is “presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v.*
17 *Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the
18 federal court bears the burden of establishing that the court has the requisite subject matter
19 jurisdiction to grant the relief requested. *Id.*

20 “Challenges to Article III standing implicate a court’s subject matter jurisdiction and
21 therefore are properly raised under” Rule 12(b)(1). *Center for Food Safety v. Perdue*, 517 F.
22 Supp. 3d 1034, 1037 (N.D Cal. 2021) (citation omitted). A plaintiff must establish standing to
23 bring claims, which at an “irreducible minimum” requires three elements: “(1) an injury that is (2)
24 fairly traceable to the defendant’s allegedly unlawful conduct and that is (3) likely to be redressed
25 by the requested relief.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992).

26 A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d
27 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the
28 allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

1 The challenger asserts that the allegations in the complaint are insufficient “on their face” to
2 invoke federal jurisdiction. *See Safe Air Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
3 Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are
4 true and draws all reasonable inference in favor of the party opposing dismissal. *See Wolfe*, 392
5 F.3d at 362.

6 “By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
7 themselves, would otherwise invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. To resolve
8 this challenge, the court “need not presume the truthfulness of the plaintiff’s allegations.” *Id.*
9 (citation omitted). Instead, the court “may review evidence beyond the complaint without
10 converting the motion to dismiss into a motion for summary judgment.” *Id.* (same). Once the
11 moving party has made a factual challenge by offering affidavits or other evidence to dispute the
12 allegations in the complaint, the party opposing the motion must “present affidavits or any other
13 evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject
14 matter jurisdiction.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also Savage*
15 *v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

16 II. RULE 12(B)(6)

17 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
18 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, the
19 plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
20 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff
21 pleads facts that allow the court to “draw the reasonable inference that the defendant is liable for
22 the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There
23 must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts
24 do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to
25 “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

26 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
27 court accepts her allegations as true and draws all reasonable inferences in her favor. *See Usher v.*
28 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to

1 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or
2 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

3 If the court dismisses the complaint, it “should grant leave to amend even if no request to
4 amend the pleading was made, unless it determines that the pleading could not possibly be cured
5 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making
6 this determination, the court should consider factors such as “the presence or absence of undue
7 delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments,
8 undue prejudice to the opposing party and futility of the proposed amendment.” *Moore v. Kayport
9 Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

10 DISCUSSION

11 I. STANDING

12 Smucker first challenges Humphrey’s standing to bring her claims. Mot. to Dismiss
13 (“MTD”) [Dkt. No. 28] 6:3-21. Central to Smucker’s argument is its interpretation of this matter
14 as a product defect case, not one of false advertising. *See id.* at 6:15-21. Smucker contends that
15 “[a]ll of plaintiff’s claims turn on her assumption that the products are necessarily unsafe, that
16 selling them was negligent, and that describing them as safe was misleading—that is, that they are
17 defectively designed and labeled.” *Id.* at 6:15-19. According to Smucker, Humphrey “tries to
18 dress a no-injury product liability lawsuit in the clothes of a consumer false advertising case, even
19 though her allegations unequivocally challenge the products’ alleged underlying toxicity, and thus
20 their safety for any purpose.” *Id.* at 6:19-21. And, Smucker argues, in a product defect case
21 where the product did not malfunction, a plaintiff must allege something more than overpayment
22 to establish standing. *See id.* at 2:3-5.

23 Humphrey responds that “[t]his is a simple false advertising case”: Smucker represents that
24 the products are “healthy and safe, when in reality the products contain harmful chemicals
25 rendering the labeling and representations false.” Oppo. [Dkt. No. 31] 1:2-4. She accuses
26 Smucker of attempting to “heighten plaintiff’s pleading requirements by painting the case as one
27 premised on a defective product.” *Id.* at 2 n.1.

28 It is well-established that a plaintiff is the master of her complaint. *See Newtok Village v.*

1 Patrick, 21 F.4th 608, 616 (9th Cir. 2021). This principle is often applied in the context of
2 whether a federal question is presented on the face of a well-pleaded complaint. *See id.* But the
3 same principle carries over here. Just as a plaintiff may plead certain claims to invoke (or avoid)
4 federal jurisdiction, she may plead certain claims in lieu of others, depending on her theory of the
5 case.

6 Smucker’s attempt to recast this as a product defect case lacks merit. The allegations and
7 claims presented in the FAC align with a theory of false advertising: Humphrey alleges that
8 Smucker represents that the products are healthy for cats and dogs despite knowing (and failing to
9 adequately disclose) that they contain TiO₂ and that their packaging contains (or risks containing)
10 PFAS, both of which are harmful. *See* FAC ¶¶ 1-2, 8. The FAC alleges that Humphrey relied on
11 the allegedly false and misleading statements on the packaging, purchased the products believing
12 they were “free from harmful ingredients and would indeed support . . . the health of her pets,” and
13 would not have done so had she known “the true facts about their contents.” *Id.* ¶¶ 18-19.

14 These types of false advertising cases are common in this District, as Humphrey notes. *See*
15 Oppo. at 4:3-5:2. Two of mine are illustrative. *Gagetta v. Walmart, Inc.*, No. 22-CV-03757-
16 WHO, --- F. Supp. 3d ----, 2022 WL 17812924, at *1-2 (N.D. Cal. Dec. 19, 2022), was premised
17 on allegations that the plaintiffs purchased several herbs and spices that “contain (or have a risk of
18 containing) unsafe toxic heavy metals,” and that their labels—which the plaintiffs allegedly saw
19 and relied upon in deciding to purchase the products—“did not contain warnings that the products
20 contained or risked containing heavy metals.” The plaintiffs alleged that had they known that the
21 herbs and spices contained or risked containing the metals, they would not have purchased them or
22 would have paid less for them. *Gagetta*, 2022 WL 17812924, at *1. I determined that the “actual
23 economic harm” was that the plaintiffs “overpaid for products that they did not know risked
24 containing these metals, which they allege are unsafe at any level, and which [the defendant] does
25 not contest are likely present in the products.” *Id.* at *6.

26 In *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 842 (N.D. Cal. 2018), the plaintiffs alleged
27 that the defendants’ dog food products contained “material and significant levels of arsenic and
28 lead” and/or BPA, which were dangerous for dogs. The plaintiffs further alleged that the

1 defendants knew or should have known about the presence of those containments, but that their
2 products did not “contain any warning label or disclose [their] presence.” *Id.* at 842. Instead, the
3 product labels allegedly “contain[ed] various health claims and promises,” which the plaintiffs
4 allegedly saw and relied upon in purchasing the dog food. *Id.* at 842-43. The plaintiffs also
5 alleged that had they known that the products contained “any level of” arsenic, lead, or BPA, they
6 would not have purchased them. *Id.* at 843. Drawing upon “[s]imilar allegations in the food
7 mislabeling context,” I determined that the plaintiffs had sufficiently alleged an economic injury
8 based on their allegations that “were it not for defendants’ labeling, which omit the presence of
9 lead, arsenic, and BPA in their products, plaintiffs would not have purchased and spent money on
10 their products.” *See id.* at 846.

11 Smucker attempts to distinguish *Gagetta* and *Zeiger* by arguing that these cases allegedly
12 “omitted something that the product inadvertently contained,” and that Humphrey alleges that the
13 products contain TiO₂ and the packaging PFAS “by design, not by accident or contamination.”
14 *See Reply* [Dkt. No. 32] 2:25-3:14. This is a red herring. Neither *Gagetta* nor *Zeiger* expressly
15 addressed whether the alleged contaminants were in the products intentionally or by accident.
16 And that distinction has no apparent bearing on false advertising claims, which center on how a
17 reasonable consumer would understand a product’s labeling, packaging, or advertising. *See*
18 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (discussing reasonable
19 consumer test for false advertising claims). Whether TiO₂ and PFAS are in the products by
20 design or not is not relevant; what matters is what Smucker represented to consumers and whether
21 those consumers were likely to be deceived. *See id.*

22 Smucker contends that I “dealt with a similar situation” in *Cahen v. Toyota Motor*
23 *Corporation*, 147 F. Supp. 3d 955, 967 (N.D. Cal. 2015), where I “treated plaintiffs’ allegations
24 not as traditional false advertising claims, but claims about an ‘alleged product defect.’” MTD at
25 7:3-10. There, the product defect theory—and absence of real allegations about false
26 advertising—were obvious. The plaintiffs’ central allegation was that the defendants’ vehicles
27 relied on a computerized communication network that did not use any authentication or encryption
28 and thus, were susceptible to remote hacking. *See Cahen*, 147 F. Supp. 3d at 958-59. Although

1 the plaintiffs further alleged that despite knowing of these security vulnerabilities, the defendants
2 “market their vehicles as safe,” they framed their case as one involving a design defect. *See id.* at
3 959. This is evident throughout the operative complaint, which not only repeatedly referenced the
4 alleged “design defects,” but also premised the claims on said defect. *See Cahen v. Toyota Motor*
5 *Corp.*, No. 15-CV-01104-WHO (N.D. Cal. filed Mar. 10, 2015), Dkt. No. 37 (alleging in part that
6 the defendants “knowingly and intentionally conceal[ed] from plaintiffs . . . that the class vehicles
7 suffer from a design defect,” that had the plaintiffs “known about the design defects . . . they
8 would not have purchased their class vehicles,” and that the vehicles “are inherently defective in
9 that there are defects in the electronic and computerized components”). Those types of allegations
10 are not present here. *See generally* FAC.

11 Smucker fixates on a few words within the FAC that it contends are “indicia of a product
12 liability case like *Cahen*, not a false advertising case.” *See Reply* at 2:22-24. But a single
13 description of the products as “worthless” does not transform this into a product defect case. *See*
14 *id.*, *see also* FAC ¶ 51. The other phrase that Smucker takes issue with—that the products are “not
15 safe for consumption”—does not appear in the FAC. *See Reply* at 2:13-24; *see generally* FAC.

16 Humphrey casts her case as one of false advertising, which is consistent with the
17 allegations and claims within the FAC. Her underlying theory—that Smucker represents that the
18 products are healthy for pets, but in reality contain TiO2 and PFAS—mirrors other false
19 advertising cases. Smucker “offers no authority that permits the court to usurp plaintiffs’ mastery
20 over their own pleading and rewrite their claim” under a different theory of liability. *See Lacesa*
21 *v. Walgreen Co.*, No. 22-CV-02558, 2022 WL 19240778, at *1 (C.D. Cal. Sept. 22, 2022). And
22 because the FAC alleges that Humphrey and other class members spent money that, absent
23 Smucker’s actions, they would not have spent “[a] quintessential injury-in-fact”—she has
24 plausibly shown an economic injury giving rise to standing. *See* FAC ¶¶ 19, 61; *see also* *Zeiger*,
25 304 F. Supp. 3d at 846 (“A ‘quintessential injury-in-fact’ occurs when plaintiffs allege that they
26 ‘spent money that, absent defendants’ actions, they would not have spent.’”) (citation omitted);
27 *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706 (9th Cir. 2020) (“We have consistently recognized
28 that a plaintiff can satisfy the injury in fact requirement by showing that she paid more for a

1 product than she otherwise would have due to a defendant’s false representations about the
2 product.”).²

3 II. MULTI-STATE SUBCLASS

4 “Plaintiffs must show they have standing for each claim they raise, and plaintiffs do not
5 have standing to bring claims under the laws of states where they have alleged no injury,
6 residence, or other pertinent connection.” *Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 909
7 (N.D. Cal. 2019) (citations omitted); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352
8 (2006) (“a plaintiff must demonstrate standing for each claim he seeks to press”). Smucker argues
9 that Humphrey’s claims asserted on behalf of the multi-state subclass should be dismissed because
10 she “lacks standing to represent consumers of the products who claim to have been injured by
11 violations of the consumer protection laws of states other than California.” MTD at 9:19-22; *see*
12 *also* FAC ¶¶ 166-174 (asserting a violation of the consumer fraud acts of the states in the multi-
13 state subclass).

14 Humphrey contends that Smucker’s challenge implicates typicality and adequacy, making
15 it a question for class certification rather than the pleadings stage. Oppo. at 10:14-24. She relies
16 on the Ninth Circuit’s decision in *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015),
17 where the court recommended the “class certification approach” of deferring until class
18 certification deciding whether class representatives had the ability to represent the claims of absent
19 class members.

20 As I have previously noted, *Melendres* addressed a different question: “namely, the ability
21 of named plaintiffs to represent absent class members who were subjected to different types of
22 unconstitutional searches.” *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, 533
23 F. Supp. 3d 858, 881 (N.D. Cal. 2021). “A number of my colleagues”—and me—“have expressly
24 addressed and declined to follow *Melendres* and rejected at the motion to dismiss stage absent
25 class member claims arising under state laws where no class member resided or was harmed.” *See*

27 2 Because the FAC sufficiently alleges an injury for standing purposes based on overpayment, I
28 need not decide whether it also sufficiently alleges an injury under a benefit of the bargain theory.
See Oppo. at 5:3-6:24.

1 *id.* at 880-81 (citing cases).

2 I consider this question on a case by case basis; in this case, dismissal is appropriate now.
3 *See id.* at 881. Humphrey alleges claims on behalf of class members living in nine other states:
4 Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and
5 Washington, yet alleges no injury, residence, or other “pertinent connection” to those states. *See*
6 FAC ¶ 62; *Jones*, 400 F. Supp. 3d at 909. Although this is not a nationwide class, and Humphrey
7 alleges that these states have “similar consumer fraud laws,” discovery across nine additional
8 states will still be significant. *See* FAC ¶ 62 n.7; *see also Johnson v. Nissan N. Am., Inc.*, 272 F.
9 Supp. 3d 1168, 1175 (N.D. Cal. 2017) (dismissing at the pleading stage claims asserted on behalf
10 of a nationwide class because “plaintiffs have two named class representatives in two states
11 purporting to represent a nationwide class, creating the significant burden of nationwide
12 discovery”); *Zeiger*, 304 F. Supp. 3d at 847 (dismissing claims at the pleading stage in part
13 because “[p]laintiffs are all residents of California, but purport to represent a nationwide class,
14 creating the significant burden of nationwide discovery”). Allowing unrepresented claims to
15 proceed “would subject defendants to discovery in these additional states before plaintiffs have
16 secured actual plaintiffs who clearly have standing and are willing and able to assert claims under
17 these state laws.” *See Jones*, 400 F. Supp. 3d at 910 (citation and quotations omitted).

18 I will give Humphrey the opportunity to find those other plaintiffs. Claim 10, which
19 asserts violations of the consumer fraud acts of the states in the multi-state subclass, is
20 DISMISSED with leave to amend.

21 **III. ALLEGED MISREPRESENTATIONS**

22 Turning to the merits of Humphrey’s claims, Smucker argues that the statements alleged in
23 the FAC are not actionable affirmative misrepresentations, because they are not specific and
24 measurable, not sufficiently alleged to be false, or amount to subjective opinions. MTD at 12:2-
25 13:7. According to Smucker, the UCL, CLRA, and FAL claims fail as a result. *Id.* at 12:4-6.

26 “Although misdescriptions of specific or absolute characteristics of a product are
27 actionable, generalized, vague, and unspecified assertions constitute mere puffery upon which a
28 reasonable consumer could not rely, and hence are not actionable.” *McKinney v. Google, Inc.*, No.

1 10-CV-01177-EJD, 2011 WL 3862120, at *6 (N.D. Cal. Aug. 30, 2021) (citations omitted and
2 cleaned up). Unlike puffery, a representation of fact “is one which makes a specific and
3 measurable claim, capable of being proved false or of being reasonably interpreted as a statement
4 of objective fact.” *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1039 (N.D. Cal. 2014) (citations
5 and quotations omitted).

6 Smucker argues that certain statements alleged in the FAC are not “specific and
7 measurable”: “balanced nourishment in every bite” (on the Kibbles ‘n Bits label); “indoor health”
8 (on the Meow Mix label); and “100% Complete and Balanced Nutrition” (on both). MTD at
9 12:14-21. In support, Smucker points to a Southern District of California case where the court
10 determined that the statements “highest quality ingredients,” “balanced eating plan,” and “part of a
11 sensible balanced diet” were non-actionable puffery. *See id.* at 21:19-21 (citing *Fraker v. KFC*
12 Corp.

, No. 06-CV-01284, 2007 WL 1296571, at *3 (S.D. Cal. Apr. 30, 2007)).

13 More recent cases have found similar statements to be actionable, at least at the pleading
14 stage. *See, e.g., In re Big Heart Pet Brands Litig.*, No. 18-CV-00861-JSW, 2019 WL 8266869, at
15 *1, 17-18 (N.D. Cal. Oct. 4, 2019) (finding that the statement “100% Complete and Balanced
16 Nutrition” was actionable under the plaintiffs’ theory that the defendant’s dog food products
17 contained a drug used as a sedative, anesthetic, and a euthanizing agent); *Grossman v. Schell &*
18 *Kampeter, Inc.*, No. 18-CV-02344, 2019 WL 1298997, at *4-5 (E.D. Cal. Mar. 21, 2019) (finding
19 that statements on dog food packaging that it provided the “balanced diet that nature intended,”
20 and helped support “optimal cellular health” and maintain “overall good health” “go beyond mere
21 puffery, into assertions of fact,” because they conveyed that “the products are nutritious and safe”
22 while the plaintiffs alleged that they contained heavy metals, pesticides, acrylamide, and/or BPA).
23 Similarly, I wrote in *Zeiger* that statements “concerning safety and quality assurances” were not
24 objectively true (as alleged by the plaintiffs) nor a subjective opinion, and instead presented
25 “measurable claims that plaintiffs indeed seek to prove are false through this very suit.” *See*
26 *Zeiger*, 304 F. Supp. 3d at 851.

27 The same is true here. Humphrey has identified a number of statements on the products’
28 packaging that, as alleged, imply that they are healthy for pets. As alleged, the statements at issue

1 make a specific and measurable claims that are capable of being proved false (i.e., that the
2 products are *not* healthy because they contain TiO2 and PFAS, or risk containing the latter). *See*
3 *Rasmussen*, 27 F. Supp. 3d at 1039. Alternatively, it is plausible that these statements are capable
4 of being reasonably interpreted as a statement of objective fact—a point that Smucker does not
5 contest. *See id.*; *see generally* MTD. Although some of the statements are closer calls than others
6 (“indoor health,” for example), read alongside other statements on the packaging (such as “100%
7 Complete & Balanced Nutrition For Adult Cats” and “helps maintain healthy weight”), they
8 plausibly “contribute[] . . . to the deceptive context of the packaging as a whole.” *See Williams*,
9 552 F.3d at 939 n.3 (finding that the word “‘nutritious,’ were it standing on its own, could
10 arguably constitute puffery, since nutritiousness can be difficult to measure concretely,” but that it
11 contributed “to the deceptive context of the packaging as a whole” and thus could not be dismissed
12 as puffery).

13 Smucker next argues that certain statements are not actionable because Humphrey “has not
14 alleged anything that would make them objectively false.” MTD at 12:22-23. It points to
15 statements that the 9Lives cat food will build “strong muscles,” enable “healthy heart and vision,”
16 produce “healthy skin & coat,” “Helps Support a Healthy Immune System,” “Helps Support
17 Healthy Weight & Metabolism,” and “Helps Maintain Weight & Digestion.” *Id.* at 12:22-26
18 (citing FAC ¶ 45). It contends that even if Humphrey’s allegations about the risks of TiO2 and
19 PFAS are true, she “has not alleged how that risk impacts pets and whether it would render any of
20 these claims regarding muscles, heart health, vision, skin, coat, weight, digestion, and metabolism
21 untrue.” *Id.* at 12:26-13:2.

22 Smucker ignores allegations in the FAC that TiO2 and PFAS “are linked to harmful health
23 effects—such as DNA and chromosomal damage, organ damage, inflammation, brain damage,
24 genital malformations, lesions in the liver and kidneys, cell neurosis, damage to the liver and
25 immune system, various cancers, increased cholesterol levels, increased risk of obesity, adverse
26 cardiovascular effects, and eye disease.” *See* FAC ¶ 52. Contrary to Smucker’s assertions, the
27 FAC expressly alleges how the risks of TiO2 and PFAS impact heart health, vision, and weight.
28 *See id.* And it says that TiO2 and PFAS can cause organ damage, inflammation, cell neurosis, and

1 various cancers could plausibly impact a pet's muscles, skin, coat, digestion, or metabolism. *See*
2 *id.* The FAC sufficiently links the alleged risks of TiO₂ and PFAS to the statements at issue in a
3 way that would make them objectively false.

4 Smucker's arguments that the statements identified in the FAC are not actionable fall
5 short. With no other argument against the UCL, CLRA, and FAL claims, they may proceed.

6 IV. NEGLIGENCE MISREPRESENTATION

7 Finally, Smucker argues that Humphrey's negligent misrepresentation claim must be
8 dismissed because it does not allege a physical harm or that she purchased the products for a
9 business purpose. MTD at 13:8-20. Humphrey argues that these are not among the elements of a
10 negligent misrepresentation claim, which are: "(1) misrepresentation of a past or existing material
11 fact, without reasonable ground for believing it to be true, and (2) with intent to induce another's
12 reliance on the fact misrepresented; (3) ignorance of the truth and justifiable reliance on the
13 misrepresentation by the party to whom it was directed; and (4) resulting damage." Oppo. at 15:2-
14 11 (citing *Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909, 924 (N.D. Cal. 2013)).

15 Smucker's argument is premised on *Bock v. Hansen*, 225 Cal. App. 4th 215, 229 (2014). It
16 is not clear that the case applies here. *See* MTD at 13:8-20. The primary question in *Bock* was
17 whether a negligent misrepresentation claim could lie against an insurance adjuster as a matter of
18 law. *See* 225 Cal. App. 4th at 226. The court determined that it could because a special
19 relationship existed between the insurer and the insured, and that as an employee of the insurer,
20 the adjuster owed a duty to the insured. *See id.* at 229. The court then went on to state that:

21 Likewise, the general law of negligent misrepresentation applies. It is generally
22 said that ". . . California courts have recognized a cause of action for negligent
23 misrepresentation, i.e., a duty to communicate accurate information, in two
24 circumstances. The first situation arises where providing false information poses a
25 risk of and results in physical harm to person or property. The second situation
arises where information is conveyed in a commercial setting for a business
purpose.

26 *Id.* (citing *Friedman v. Merck & Co.*, 17 Cal. App. 4th 454, 477 (2003)). Smucker relies on this
27 passage in arguing that one of two "legal prerequisites" must exist for a plaintiff to assert a
negligent misrepresentation claim: a risk of physical harm or that the information was conveyed in
28

1 a commercial setting. *See* MTD at 13:10-20; Reply at 8:14-16.

2 It appears that courts primarily apply *Bock* in the insurance context when determining
3 whether an insurance adjuster may be held liable for a negligent misrepresentation claim. *See*,
4 *e.g.*, *Njoku v. GEICO Gen. Ins. Co.*, No. 19-CV-07757-JST, 2020 WL 4915433, at *2-3 (N.D. Cal.
5 May 6, 2020); *Nido v. Nationwide Mut. Ins. Co.*, No. 19-CV-07724-LHK, 2020 WL 1865324, at
6 *5-6 (N.D. Cal. Apr. 14, 2020); *818 Computer, Inc. v. Sentinel Ins. Co., Ltd.*, No. CV-19-0009,
7 2019 WL 698102, at *3-4 (C.D. Cal. Feb. 19, 2019). Despite calling the proposition cited in *Bock*
8 “black-letter California law,” Smucker does not point to any case law or other authority applying
9 the above-referenced statement to negligent misrepresentation claims asserted in consumer
10 protection or false advertising cases. *See* MTD at 13:8-20; Reply at 8:12-21. Courts in this
11 District and elsewhere *have* considered negligent misrepresentation claims in this or similar
12 contexts without addressing the “legal prerequisites” that Smucker asserts. *See, e.g.*, *Alvarez v.*
13 *Adtalem Educ. Grp.*, No. 19-CV-04079-JSW, 2019 WL 13065378, at *3 (N.D. Cal. Dec. 16,
14 2019) (allowing negligent misrepresentation claim to proceed based on a university’s alleged
15 misrepresentations about graduates’ ability to obtain employment in their chosen career fields
16 within six months of graduating); *Zeiger*, 304 F. Supp. 3d at 850-52; *Lemus v. Rite Aid Corp.*, 613
17 F. Supp. 3d 1269, 1281 (C.D. Cal. 2022) (allowing negligent misrepresentation claim to proceed
18 in part because the plaintiffs had adequately alleged facts “peculiarly within the defendant’s
19 knowledge”). These courts have focused on the elements of a negligent misrepresentation claim
20 (which do not include physical harm or that the information is conveyed in a commercial setting)
21 or the application of the economic loss doctrine, which Smucker does not expressly challenge
22 here. *See, e.g.*, *Robinson v. J.M. Smucker Co.*, No. 18-CV-04654-HSG, 2019 WL 2029069, at *5-
23 6 (N.D. Cal. May 8, 2019) (dismissing negligent misrepresentation claim as barred by the
24 economic loss rule).

25 And even if *Bock* did stand for the proposition that Smucker asserts, it is unclear why
26 Humphrey’s allegations do not satisfy the second situation: “where information is conveyed in a
27 commercial setting for a business purpose.” *See* 225 Cal. App. 4th at 229. *Friedman*, the case
28 cited in *Bock*, explains that this “rules out casual statements or opinions given in ordinary private

1 conversations or social meetings” and applies to statements made during the course of business
2 when the defendant has a pecuniary interest in the transaction in which the information is
3 provided. *See Friedman*, 17 Cal. App. 4th at 481-83 (citations omitted). Smucker allegedly made
4 the statements at issue on the packaging of the products it sells to consumers, which it has a
5 pecuniary interest in selling, and thus would plausibly fall within this category. I see no reason to
6 dismiss the negligent misrepresentation claim at this stage.

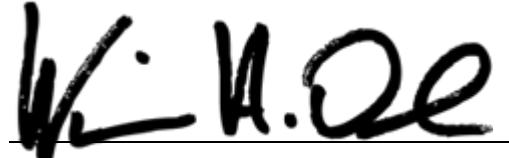
7 **CONCLUSION**

8 The motion to dismiss is DENIED in part and GRANTED in part, with leave to amend the
9 claims asserted on behalf of the multi-state subclass. Any amended complaint is due within 20
10 days of the issuance of this Order.

11 The Case Management Conference is reset for June 13, 2023, at 2:00 p.m. A Joint Case
12 Management Statement is due by June 6, 2023.

13 **IT IS SO ORDERED.**

14 Dated: May 22, 2023

15 
16

17 William H. Orrick
18 United States District Judge